No. 95-1201

In the Supreme Court of the United States

OCTOBER TERM, 1995

VICKY M. LOPEZ, ET AL., APPELLANTS

v.

MONTEREY COUNTY, CALIFORNIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

DREW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

ALAN JENKINS
Assistant to the Solicitor General

STEVEN H. ROSENBAUM
EILEEN PENNER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

31 pp

QUESTION PRESENTED

Whether the district court erred in ordering an election using voting changes that it concluded had not been precleared, as required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

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INTEREST OF THE UNITED STATES

This case conerns the relief that is appropriate when a covered jurisdiction fails to obtain preclearance of voting changes, as required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Under Section 5, the Attorney General is responsible for reviewing voting changes submitted for administrative preclearance and for defending declaratory judgment actions seeking judicial preclearance brought in the United States District Court for the District of Columbia. The Act also gives the Attorney General authority to bring actions to prevent the implementation of unprecleared voting changes. The Court's resolution of this case will

affect the Attorney General's enforcement responsibilities under Section 5. The United States participated as *amicus curiae* in the action below and, in response to this Court's invitation, filed a brief in support of appellants' application to this Court for a stay.

STATEMENT

Congress enacted the Voting Rights Act of 1965 to help eliminate discrimination in voting. Section 5 of the Act, 42 U.S.C. 1973c, provides that a covered jurisdiction may not implement any change in election practices unless it first obtains a declaratory judgment from a three-judge panel of the United States District Court for the District of Columbia that the change does not have the purpose, and will not have the effect, of denying the right to vote on account of race, color, or membership in a language minority group. Alternatively, the change may be enforced if, within 60 days after its submission to her, the Attorney General of the United States has interposed no objection to it.

1. Monterey County, California, is a jurisdiction covered under Section 5 with respect to voting practices "different from that in force or effect on November 1, 1968." 42 U.S.C. 1973c; see also 28 C.F.R. Pt. 51, App. The County's ordinances consolidating judicial election districts, altering district boundaries, and converting a district system to a county-wide system in which the judges are elected at large are changes in voting practices covered by the preclearance provisions of Section 5.

According to the 1990 census, thirty-four percent of Monterey County's total population, and seventeen percent of its citizen voting age population, is

Hispanic. J.S. App. 94. Before 1995, no Latino had ever been elected or appointed to the Monterey County municipal court. The two Latino candidates who had run for the municipal court had lost in the 1986 elections. *Id.* at 103.[1] Similarly, from 1890 until 1992, no Latino had ever served on the Monterey County Board of Supervisors. *Id.* at 98. The County and appellants have stipulated that elections in Monterey County are characterized by white bloc voting, which has operated to defeat the electoral choices of Latinos. *Id.* at 95-96.

On November 1, 1968, the date it became covered under Section 5, Monterey County contained two municipal court districts, each with two judges, and seven justice court districts, each with one judge.[2] Those judgeships were filled through separate district elections. Between 1968 and 1983, the Monterey County Board of Supervisors adopted a series of ordinances that consolidated and altered the boundaries of the municipal and justice court districts. As a result of those ordinances, by 1983 the

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[1] Shortly after the district court issued its December 20, 1994, order requiring an interim election under a remedial electoral plan, see pp. 7-8, infra, the Governor of California appointed the first two Latinos ever to sit on the Monterey County municipal court. In the June, 1995, election held under the remedial plan, one of the appointed Latino judges was re-elected as an unchallenged incumbent. The second appointed Latino judge was defeated by another Latino candidate. Status Conf. Statement of County at 2-3.

[2] Prior to 1994, justice courts existed in California districts containing 40,000 or fewer persons, and municipal courts existed in districts containing more than 40,000 persons. Cal. Const. Art. VI, § 5 (1992). In a 1994 referendum, California eliminated justice courts. Proposition 191; see Cal. Const. Art. VI, § 5 (1994).

County had converted the preexisting judicial election system—under which four municipal court positions and seven justice court positions were filled through separate district elections—to a system in which nine municipal court judges were elected at large to a single county-wide municipal court. J.S. App. 12. At present, the municipal court has ten judges elected at large.

2. On September 6, 1991, appellants, who are Latino voters in Monterey County, filed this suit under Section 5 of the Voting Rights Act. They alleged that the County violated Section 5 by implementing new procedures for the election of lower court judges without first obtaining preclearance from the Attorney General or from a three-judge panel of the United States District Court for the District of Columbia. J.S. App. 12.[3]

On April 1, 1993, the district court entered partial summary judgment for appellants. It held that the county ordinances that consolidated the judicial districts and converted the district system to an at-large, county-wide electoral system were changes in voting subject to Section 5's preclearance requirement. The court further held that the consolidation ordinances had never been judicially or administratively precleared.[4] The court ordered the County

[3] Pursuant to 42 U.S.C. 1973c and 28 U.S.C. 2284, a three-judge panel of the United States District Court for the Northern District of California was convened to consider appellants' Section 5 claim. J.S. App. 12.

[4] The court rejected the County's contention that the Attorney General's preclearance of a state statute, 1983 Cal. Stat. 4915, "implicitly" cleared all of the previously enacted but unsubmitted county ordinances that effected the consolidations, *Lopez* v. *Monterey County*, Order Granting Plaintiffs' Motion for Partial Summary Judgment and Denying Defendant's Motions, No. C-91-20559-RMW), slip op. 13 (Apr. 1, 1993. With respect to one of the ordinances, which was referred to in the 1983 statute, the court said that, "[e]ven assuming that the Attorney General's clearance of state statute 1249 operated to implicitly preclear County Ordinance 2930 to which the statute referred, the parties agreed during the oral argument in this matter that all six (6) ordinances should be submitted for preclearance if all ordinances were not precleared." *Ibid.*

to seek preclearance of the ordinances, and held that "they cannot be implemented by [the] county until such clearance is received," *Lopez* v. *Monterey County*, Order Granting Plaintiff's Motion for Partial Summary Judgment and Denying Defendant's Motions, No. C-91-20559-RMW, slip op. 13 (Apr. 1, 1993). J.S. App. 12.[5]

On August 10, 1993, the County filed suit in the United States District Court for the District of Columbia, seeking a declaratory judgment that its consolidation ordinances did not have the purpose or effect of discriminating on the basis of race, color, or language-minority status. *County of Monterey* v. *United States*, C.A. No. 93-1639 (D.D.C. filed Aug. 10, 1993). On October 7, 1993, the County dismissed that action voluntarily.[6] The County stipulated that it was "unable to establish that the Municipal Court Judicial Court Consolidation Ordinances adopted by the County between 1968 and 1983 did not have the effect of denying the right to vote to Latinos in Monterey County due to the retrogressive effect

[5] The court denied the County's motion to dismiss the action for failure to include the State as an indispensable party, and refused to join the State as a defendant. *Lopez* v. *Monterey County*, slip op. 7.

[6] The action was dismissed without prejudice to any future claim. Stipulated Dismissal (Oct. 7, 1993).

several of these ordinances had on Latino voting strength in Monterey County." J.S. App. 13.[7]

The parties then submitted several proposed electoral plans for the Northern District of California District Court's review. On December 22, 1993, the State intervened for the limited purpose of objecting to the parties' proposed plans.[8] The State argued that aspects of the proposed plans were contrary to provisions of the California Constitution. J.S. App. 69. Specifically, it argued that the proposed plans would contravene a state constitutional provision that prohibits division of cities into separate municipal court districts, Cal. Const., Art. VI, § 5(a), and a provision that generally requires the electoral and jurisdictional bases of municipal court judgeships to be coextensive, Cal. Const., Art. VI, § 16(b). J.S. App. 13. The court declined, "without prejudice," to approve the proposed electoral plans. *Id.* at 13-14. At a March 13, 1994, hearing, the County presented to the court findings by the County Board of Supervisors "supporting the Board's conclusion that '[t]he Board of Supervisors is unable to devise or prepare any plan for the election of municipal court judges in Monterey County that does not conflict with at least one state law and still complies with the Voting Rights Act.'" J.S. App. 14.

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[7] Under Section 5, covered jurisdictions have the burden of demonstrating, *inter alia*, that an electoral change will not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U.S. 130, 141 (1976).

[8] The court also allowed a municipal court judge, Judge Michael S. Fields, to intervene in his personal capacity. J.S. App. 13.

On June 1, 1994, the district court enjoined the County from holding elections for municipal court judgeships pending adoption and preclearance of a lawful, permanent electoral plan. The court ordered the County to take steps necessary to obtain changes in existing state law so that such a plan could be implemented. J.S. App. 14. As a result, the elections scheduled for 1994 did not take place.

On December 20, 1994, the court ordered that 1995 elections for seven municipal court seats take place under a special election plan that had been jointly proposed by appellants and the County as an interim remedy. J.S. App. 23. The special election plan divided the County into four electoral districts but did not alter the county-wide administrative and jurisdictional structure of the municipal court system. *Id.* at 18-20.[9] The court ordered that the judges elected under the interim plan would serve an eighteen-month term, instead of the normal six-year term.

The court concluded that elections under an interim plan were necessary because "[c]ontinuance of the injunction without any election pending implementation of a precleared system would deprive the voters of their right to elect judges." J.S. App. 16. The court rejected an at-large electoral system as an interim remedy, reasoning that "[e]vidence has been offered that Latino voters have had their voting strength diluted and, therefore, a special election under an at-large system would probably preclude

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[9] The court found that "the County made a good faith effort to secure passage of an amendment to the California Constitution regarding the configuration of municipal court districts in Monterey County" (J.S. App. 14), but that those efforts had been unsuccessful.

[Latinos] from electing any judge of their choice." *Id.* at 19. The court further concluded that the interim plan did not intrude unnecessarily on state interests. Although the electoral districts employed in the interim plan were not coextensive with the primary jurisdictional base of each judicial office, the court noted that current state law did not require "strict linkage" of electoral and jurisdictional districts. *Id.* at 21. The court also observed that, under California law, "the rights of nonresidents are often judged by resident [municipal court] judges," and "nonresident judges are frequently assigned to other districts." *Ibid.* In addition, "[t]he State's interest in preventing the division of cities does not appear to reflect any compelling state policy," given that an exception had been made for at least one county. *Id.* at 19.

The interim plan was submitted to the Attorney General for preclearance and the plan was precleared on March 6, 1995. J.S. App. 53-55. The special election occurred June 6, 1995. Pursuant to the court's orders, the terms of the seven judges elected in the special election, and that of an eighth judge elected previously, will expire on the first Monday in January, 1997. *Id.* at 2.

On November 1, 1995, the court held a status conference to discuss what further interim remedy was appropriate in light of the County's continuing failure to adopt and preclear a valid, permanent plan. At that conference, the court and parties discussed, *inter alia*, whether this Court's decision in *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995), affected the propriety of extending the terms of judges elected under the interim remedial plan. At the status conference, the court did not request, and the parties did not present, evidence regarding the role that racial considerations

played in the development of the plan, or the extent to which a compelling interest, such as compliance with the substantive provisions of the Voting Rights Act, may have justified the plan's electoral districts. A county attorney expressed the view, however, that the electoral districts in the interim remedial plan were drawn on the basis of race. State Mot. to Dis. App. 13a.

3. On November 1, 1995, the court "modified" its prior injunction forbidding implementation of the unprecleared election system "to allow the county-wide election of municipal court judges at the general election in [March] 1996." J.S. App. 8. The court ordered that judges elected under the county-wide, at-large plan were to serve "the normal six-year term." *Ibid.* The court thereby reinstated the County's unprecleared at-large plan.

Although the court recognized that it was "faced with a Section 5 violation" (J.S. App. 2), it concluded that the unprecleared plan should be implemented because this Court's decision in *Miller* v. *Johnson*, *supra*, "has cast substantial doubt upon the constitutionality of extending the terms [of the judges elected under the] interim plan, as that plan used race as a significant factor in dividing the County into election areas." J.S. App. 3. The court further stated that "[a] return to the status quo that existed before the enactment of the consolidation ordinances is not legal, feasible or desired" (*ibid.*) and that it "[could not] say that a county-wide election plan is necessarily unlawfully retrogressive in comparison with the prior plan or the system in effect prior to the consolidation ordinances." *Id.* at 7. The court ordered that the injunction would remain in effect as to future elections "pending preclearance of a permanent plan

that complies with the Voting Rights Act and state law." *Id.* at 8.

The court also joined the State as a defendant. It observed that "[i]f the State believes that the County is only administering a State statute and that the failure to preclear the consolidation ordinances is of no significance, it can seek to lift the injunction and have this Section 5 litigation dismissed." J.S. App. 8.

4. Appellants filed a timely notice of appeal to this Court on November 30, 1995. J.S. App. 26-27. On February 1, 1996, this Court granted appellants' motion to stay the district court's order. 116 S. Ct. 833. The Court noted probable jurisdiction on April 1, 1996. 116 S. Ct. 1349.

SUMMARY OF ARGUMENT

A. Section 5 provides that, "unless and until" administrative or judicial preclearance is obtained, a covered jurisdiction may not "enact or seek to administer" any change in its voting procedures. 42 U.S.C. 1973c. As a result, unprecleared voting changes are without legal force and may not be implemented. In order to effectuate that prohibition, this Court has consistently held that Section 5 plaintiffs are entitled to an injunction preventing implementation of unprecleared changes. *Clark* v. *Roemer*, 500 U.S. 646, 656 (1991); *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 572 (1969). Absent this right to injunctive relief, Section 5's prophylactic purpose would be thwarted.

In this case, the district court ruled that the at-large, county-wide system of electing lower court judges was a covered change that had not received judicial or administrative preclearance. By nevertheless ordering elections under that system, the district court contravened the rule of *Clark* and *Allen*.

B. 1. This case presents no "extreme circumstance," *Clark* v. *Roemer*, 500 U.S. at 654, that might justify implementation of an unprecleared voting change. Although the County was on notice for several years that its electoral changes were subject to Section 5's preclearance requirements, it has failed to obtain preclearance of a permanent electoral plan.

2. The district court erred in refusing to extend the terms of judges elected under the interim electoral plan because the plan used race as a "significant factor" in devising electoral boundaries. J.S. App. 3. An electoral plan is unconstitutional under *Miller* v. *Johnson*, *supra*, only if it subordinates traditional districting principles to racial considerations, and does so without adequate justification. The district court failed to conduct an evidentiary hearing to determine the interim plan's compliance with that fact-specific standard. Absent such an inquiry, it was error to reject the interim plan in favor of an unprecleared, at-large voting scheme.

3. Even if the court had correctly rejected the interim electoral plan, it would have erred in failing to utilize valid remedial options that would have enforced Section 5 while protecting the County's interest in the administration of its judicial system. In particular, the court failed to consider modifying the electoral system that existed prior to the adoption of the consolidation ordinances, or fashioning its own interim plan pending preclearance of a permanent electoral system.

ARGUMENT

THE DISTRICT COURT ERRED IN ORDERING ELECTIONS UNDER AN ELECTORAL PLAN THAT WAS SUBJECT TO SECTION 5 AND THAT HAD NOT RECEIVED ADMINISTRATIVE OR JUDICIAL PRECLEARANCE

A. Section 5 Required The District Court To Enjoin Implementation Of Monterey County's Unprecleared Voting Changes

1. The central purpose of Section 5's preclearance provision is to shift to covered jurisdictions the burden of establishing the legality of new voting practices before they are implemented. Congress enacted Section 5 in response to the "unremitting and ingenious defiance" of the Fifteenth Amendment by state and local officials in certain parts of the country. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 309 (1966). Congress found that litigation under prior voting rights statutes had been ineffective in remedying the widespread use of discriminatory voting practices. *Id.* at 314. In particular, it concluded that post-hoc, case-by-case litigation under the prior statutes had proven too onerous for plaintiffs, had allowed inordinate delay by recalcitrant jurisdictions, and (even when successful) had failed to prevent some jurisdictions from adopting new methods of discrimination. *Ibid.*; see also *City of Rome* v. *United States*, 446 U.S. 156, 173 (1980) (discussing history of evolving discriminatory practices at which Section 5 is aimed); *Beer* v. *United States*, 425 U.S. 130, 140 (1976) (same).

In response to these systemic problems, Congress incorporated in Section 5 "stringent new remedies" that were designed "to shift the advantage of time and

inertia from the perpetrators of the evil to its victims." *South Carolina* v. *Katzenbach*, 383 U.S. at 308, 328; *McCain* v. *Lybrand*, 465 U.S. 236, 244 (1984); *City of Rome* v. *United States*, 446 U.S. at 182. Section 5 provides that, "unless and until" administrative or judicial preclearance is obtained, a covered jurisdiction such as Monterey County may not "adopt or seek to administer" any change in its voting procedures. 42 U.S.C. 1973c. As a result, unprecleared voting changes are not "effective as law[s]," *Connor* v. *Waller*, 421 U.S. 656, 656 (1975) (per curiam), and are not enforceable, *Hathorn* v. *Lovorn*, 457 U.S. 255, 269 (1982). See also *Clark* v. *Roemer*, 500 U.S. 646, 652-653 (1991); *McCain* v. *Lybrand*, 465 U.S. 236, 245 (1984); *McDaniel* v. *Sanchez*, 452 U.S. 130, 146 (1981).

A concomitant of that principle is the rule that "[i]f voting changes subject to [Section] 5 have not been precleared, [Section] 5 plaintiffs are entitled to an injunction prohibiting the [covered jurisdiction] from implementing the changes." *Clark* v. *Roemer*, 500 U.S. at 652; see also *Lucas* v. *Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers); *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 572 (1969). The availability of an order enjoining the implementation of unprecleared voting changes is essential to the purpose and function of Section 5. Absent the availability of such relief, the burden of being subjected to presumptively discriminatory voting changes would be improperly shifted back to minority voters. See *McCain* v. *Lybrand*, 465 U.S. at 245.

The facts of this case illustrate the importance of injunctive relief where preclearance has not been obtained. Although this Court has repeatedly confirmed the applicability of Section 5 to judicial elec-

tions, see *Haith* v. *Martin*, 618 F. Supp. 410 (E.D. N.C. 1985), aff'd, 477 U.S. 901 (1986); *Brooks* v. *State Bd. of Elections*, 775 F. Supp. 1470 (N.D. Ga.), aff'd, 498 U.S. 916 (1990); *Clark* v. *Roemer*, 500 U.S. at 653-654, the County has failed to obtain preclearance of voting changes dating back to at least 1972. The County has admitted that it is unable to meet its burden of proving that the unprecleared consolidation ordinances did not have a retrogressive effect on the electoral strength of Latino voters (see J.S. App. 13). Nonetheless, a lawful, permanent plan has not yet been adopted and precleared. Absent injunctive relief, there is no reason to believe that a lawful, permanent plan will, in fact, be implemented.

2. In its Motion to Dismiss, the State contends that the question whether the consolidation ordinances are unprecleared voting changes subject to Section 5 remained open when the district court ordered that elections proceed under the at-large plan. See Mot. to Dis. 17; see also Sillman Mot. to Dis. 17. That contention is incorrect. The court clearly held that the electoral changes at issue—consolidation ordinances that transformed the County's system of electing municipal judges from a nine-district system to an at-large system—are subject to preclearance, and that the County has never obtained preclearance for those changes. J.S. App. 12; see also *id.* at 2 ("We are faced with a Section 5 violation.").

While the court invited the State to "seek to show that * * * no preclearance requirement is involved," it expressly stated that "[a]t this point the court is not persuaded by the State's position." J.S. App. 2 n.2. In addition, while ordering 1996 elections under the unprecleared plan, the court emphasized that "[t]he injunction remains in effect thereafter pending pre-

clearance of a permanent plan that complies with the Voting Rights Act and state law." *Id.* at 8. In sum, the district court ordered elections under the at-large, consolidated electoral plan, notwithstanding its conclusion that the county-wide ordinances are covered changes that have not received preclearance. *Id.* at 12; see also *id.* at 2.[10]

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[10] In its unsuccessful Motion for Summary Judgment before the district court, the County contended that the Attorney General's preclearance of a state statute, 1983 Cal. Stat. 4915 (Ch. 1249), implicitly "operated to preclear all prior County Ordinances which had consolidated the districts." *Lopez* v. *Monterey County*, slip op. 12. The district court rejected that argument, based upon this Court's rulings in *Clark* v. *Roemer*, 500 U.S. at 656-658 and *McCain* v. *Lybrand*, 465 U.S. at 249, that administrative preclearance of a statute or ordinance does not preclear prior changes unless they are specifically identified as changes.

In our brief in support of appellant's stay application in this Court, we stated that "the [district] court * * * correctly concluded that the County has never obtained preclearance" for the ordinances at issue in this case. *Lopez* v. *Monterey County*, No. A-606, Memorandum for the United States as Amicus Curiae at 7-8. Our further review of the State's administrative Section 5 submission of 1983 Cal. Stat. 4915, however, leads us to conclude that the *State* obtained preclearance for the voting changes implemented by Ordinance No. 2930. See Defendant's Summary Judgment Motion, Exh. A, at 13-34, Exh. B, at 1; Plaintiff's Summary Judgment Motion, Exh. 13. The 1983 state law mentions, but does not require, the consolidation of three Monterey County judicial election districts and provides that, upon consolidation, the consolidated court would have nine judges. Monterey County Ordinance No. 2930 implemented those changes. In our view, in responding to the Justice Department's request for additional information concerning 1983 Cal. Stat. 4915, the State "explicitly included and described" Ordinance No. 2930. See 28 C.F.R. 51.14(2) (1981); 28 C.F.R. 51.15(a) (1987). Thus, the district court

In light of its unequivocal finding that the consolidation ordinances are unprecleared changes covered by Section 5 (and particularly where the County has abandoned any attempt to obtain administrative or judicial preclearance (see J.S. App. 98-99)), the district court erred in ordering elections pursuant to the unprecleared, at-large electoral system. *Clark* v. *Roemer*, 500 U.S. at 652-653; see also *McDaniel* v. *Sanchez*, 452 U.S. 130, 146 (1981) (electoral plan devised by covered jurisdiction in response to federal court order is subject to Section 5 preclearance requirement).[11]

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appears to have erred as a factual matter in concluding that the Department of Justice never precleared Ordinance No. 2930. See J.S. App. 13.

That apparent factual error is immaterial, however, to this Court's consideration of the correctness of the district court's November 1, 1995, order, because the State's submission of 1983 Cal. Stat. 4915 did not identify the other County ordinances that consolidated the judicial districts. Specifically, the submission did not reveal that the three judicial districts consolidated by Ordinance No. 2930 had themselves been created by consolidations that occurred after November 1, 1968 and that were not precleared. Because none of the underlying consolidations were ever submitted for preclearance, those consolidations were legally ineffective. See *Clark* v. *Roemer*, 500 U.S. at 656-658; *McCain* v. *Lybrand*, 465 U.S. at 249. The consolidations effected by Ordinance No. 2930 are directly dependent upon, and are not severable from, the antecedent, unprecleared consolidations. Thus, regardless of whether the Ordinance No. 2930 changes were precleared, they may not be implemented unless and until all of the underlying changes are precleared. Cf. 28 C.F.R. 51.22(b).

[11] The State suggests (State Mot. to Dis. 14 n.19) that this action may be moot because the Attorney General's March 6, 1995, letter preclearing the interim election plan also precleared the municipal court consolidation for all purposes,

3. This Court has recognized a limited exception to Section 5's preclearance requirement where a district court independently crafts a remedial electoral plan. See *McDaniel* v. *Sanchez*, 452 U.S. 130, 148-150 (1981); *Conner* v. *Johnson*, 420 U.S. 690 (1971). That

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rather than merely for purposes of the interim election plan that was submitted to the Attorney General. That contention is incorrect. The Attorney General's 1995 letter of preclearance was limited to the changes submitted for Section 5 review by the County and actually reviewed by the Attorney General: the single-member, interim remedial district plan and the temporary steps, including district consolidation, necessary for implementation of that interim plan.

When the litigants raised questions regarding the scope of the Attorney General's March 6, 1995, preclearance letter, the United States sent a detailed explanation letter to counsel for appellants and appellees, J.S. App. 28-33 (November 13, 1995 Letter). See *McCain* v. *Lybrand*, 465 U.S. 236, 255-256 (1984) (according weight to the Department of Justice's written explanation that its initial letter had not precleared a voting change). Where, as here, a submission letter does not expressly seek preclearance of a permanent change, the approval letter cannot be construed as having precleared a permanent change. "The submission of legislation for administrative preclearance under [Section] 5 defines the scope of the preclearance request." *Clark* v. *Roemer*, 500 U.S. at 656. Further, "any ambiguity in the scope of a preclearance request must be resolved against the submitting authority." *Ibid.*; see also *McCain*, 465 U.S. at 256-257 ("A request for preclearance of certain identified changes in election practices which fails to identify other practices as new ones cannot be considered an adequate submission of the latter practices."). The district court appeared to recognize that the county-wide election system had not been precleared in its order denying appellants' motion for reconsideration. See J.S. App. 25 ("The court's Order Modifying Injunction * * * was not based on any assumption that county-wide elections for municipal court judges had been precleared.").

exception obtains only "where the court, because of exigent circumstances, actually fashions the plan itself instead of relying on a plan presented by a litigant." *McDaniel* v. *Sanchez*, 452 U.S. at 148-149 (quoting S. Rep. No. 295, 94th Cong., 1st Sess. 18-19 (1975)). Where "a covered jurisdiction submits a proposal reflecting the policy choices * * * of the people—no matter what constraints have limited the choices available to them—the preclearance requirement of the Voting Rights Act is applicable." 452 U.S. at 153. Accord 28 C.F.R. 51.18(a) (Department of Justice regulations for the administration of Section 5) ("Changes affecting voting that are ordered by a federal court are subject to the preclearance requirement of Section 5 to the extent that they reflect the policy choices of the submitting authority.").

Here, there is no question that the county-wide, at-large system under which the court ordered elections to proceed "reflect[ed] the policy choices" of the County; it was the same system that subjected the County to Section 5 liability in the first instance. See J.S. App. 7 ("The court also has considered the fact that a county-wide election system was the legislative choice of the citizens prior to the filing of this lawsuit."). Elections under that system may not proceed absent preclearance.

B. No "Extreme Circumstance" Warranting Implementation Of Unprecleared Electoral Changes Exists In This Case

This Court in *Clark* v. *Roemer*, 500 U.S. at 654, left open the question whether the existence of an "extreme circumstance" might justify a district court's decision to allow an election to take place

under an unprecleared voting system.[12] As in *Clark*, however, "[n]o such exigency exists here." *Id.* at 655. In this case, as in *Clark*, the covered jurisdiction was on notice for several years that its electoral changes were subject to Section 5's preclearance requirements, and that those changes were the target of a judicial challenge by appellants. See 500 U.S. at 655-656. As we show below, the reasons identified by the district court do not support its refusal to enjoin elections under an unprecleared electoral plan. Moreover, several alternative remedies were available that would have vindicated the purposes of Section 5 while protecting the County's legitimate interest in the administration of its judicial system.

1. In ordering elections under the unprecleared, at-large plan, the district court relied principally on its concern that *Miller* v. *Johnson*, *supra*, "ha[d] cast substantial doubt upon the constitutionality of extending the duration of the previously ordered emergency, interim plan, as that plan used race as a significant factor in dividing the County into election areas." J.S. App. 3. That concern cannot justify the court's order, however, because the court did not take the steps necessary to determine whether the interim plan actually violated *Miller*.

The Court held in *Miller* that strict judicial scrutiny is required if "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a

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[12] The court observed in *Clark* that "[a]n extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the state until the eve of the election and there are equitable principles that justify allowing the election to proceed." 500 U.S. at 654-655.

particular [electoral] district. To make this showing, a [party challenging the electoral district under the Equal Protection Clause] must prove that the legislature subordinated traditional race-neutral districting principles * * * to racial considerations." 115 S. Ct. at 2488. A party challenging the district will satisfy this "demanding" threshold standard only if it can "show that the State has relied on race in substantial disregard of customary and traditional districting practices." *Id.* at 2497 (O'Connor, J., concurring); see also *DeWitt* v. *Wilson*, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994), aff'd in relevant part and dismissed in part, 115 S. Ct. 2637 (1995).

Nor does a court's conclusion that a jurisdiction's traditional districting practices have been subordinated to racial considerations end the constitutional inquiry. Last Term, in *Adarand Constructors, Inc.* v. *Pena*, 115 S. Ct. 2097 (1995), the Court expressly rejected "the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Id.* at 2117. Rather, "[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional restraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases." *Ibid.*

Under the foregoing principles, the district court erred in refusing to extend the terms of judges elected under the interim plan simply because the plan "used race as a significant factor in dividing the County into election areas." J.S. App. 3. *Miller* did not hold that the mere consideration of race as a factor in designing electoral districts is impermissible. See 115 S. Ct. at 2490; see also *id.* at 2497 (O'Connor, J., concurring); *DeWitt* v. *Wilson*, 856 F. Supp. at 1413-1414 (consideration of race in district-

ing process, along with traditional districting principles, is constitutionally permissible). The interim district plan would be unconstitutional under *Miller* only if it subordinated traditional districting principles to race, and then only if it did so without sufficient justification. *Id.* at 2490.

The district court failed to conduct an evidentiary hearing to determine the interim plan's compliance with *Miller*, or to engage in the factual analysis that *Miller* requires. See *Miller* v. *Johnson*, 115 S. Ct. at 2488-2490 (reviewing district court's extensive factual findings regarding the motivations underlying the creation of the challenged district); *id.* at 2488 ("These principles inform the plaintiff's burden of proof at trial."); see also *Village of Arlington Heights* v. *Housing Devel. Corp.*, 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").[13] For example, the court did not examine the extent to which the interim plan recognized or subrogated the jurisdiction's traditional districting principles. See *Miller* v. *Johnson*, 115 S. Ct. at 2488, 2490. Moreover, in its earlier opinion, the court held that the interim plan

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[13] The State's and Intervenor's assertions that the November 1, 1995, status conference constituted such a hearing are incorrect. At that hearing, no party submitted or cited record evidence, no witnesses testified, and no factual findings were made. Nor could the unsupported assertion of one county attorney that race was a predominant motivation in drawing district lines support a determination that the electoral plan is unconstitutional. See *Miller* v. *Johnson*, 115 S. Ct. at 2490; cf. *Wallace* v. *Jaffre*, 472 U.S. 38, 65 (1985) (Powell, J., concurring).

"minimally intrudes on state interests and enables the County to maintain its current administrative operation of the municipal courts."[14] J.S. App. 22; accord *id.* at 21. Further, even if the interim plan were held to be subject to strict scrutiny, the district court failed to consider whether the plan was justified by a compelling interest such as compliance with the subtantive provisions of the Voting Rights Act. Compare *Miller* v. *Johnson*, 115 S. Ct. at 2490.

Extension of the terms of the judges elected under the interim plan would have been the least disruptive of the many options available to the district court.[15] Retention of judges from previous elections serves to protect the covered jurisdiction's interest in the stability of its judiciary, and has been employed by other courts faced with similar circumstances under

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[14] The court held, for example, that although Article VI, Section 16 of the California Constitution provides that "[j]udges of [municipal] courts shall be elected in their counties or districts," the "process of municipal courts extends throughout the State, Cal. Civ. Proc. Code § 84 (West 1982), and, therefore, the jurisdiction of a municipal court judge extends outside the geographic limits of the judge's electoral district." J.S. App. 21. Further, Art. VI, § 15 of the California Constitution authorizes the Chief Justice to assign municipal court judges to "any court" in any municipal court district. J.S. App. 21. The court found that that provision is frequently employed: "[a] total of 193 blanket assignments [within a county] and 73 reciprocal assignments [between counties] were issued during fiscal year 1992-93." *Ibid.* (quoting *Annual Report of the Judicial Council of California* at 167 (1994)).

[15] The district court had previously employed such a retention remedy when it extended the terms of seven judges elected under the unprecleared plan who, but for the court's injunction, would have stood for reelection in 1994. J.S. App. 16.

Section 5. See, *e.g.*, *Brooks* v. *State Board of Elections*, 790 F. Supp. 1156, 1159-1161 (S.D. Ga. 1992) (three-judge court) (permitting incumbents in unprecleared judicial offices to "hold over" beyond their terms, and holding that unprecleared, unfilled new positions could not be filled). In light of the availability and suitability of a retention remedy, the district court erred in rejecting that option, absent an adequately supported determination that the plan violated *Miller*.

2. Reversion to the last legally enforceable electoral scheme, pending preclearance, is ordinarily the appropriate remedy for a Section 5 violation. See, *e.g.*, *City of Rome* v. *United States*, 446 U.S. at 182. If a return to the *status quo ante* was no longer feasible in this case (J.S. App. 15 n.3),[16] the district court erred in failing to consider the option of adapting the pre-existing plan to the present circumstances.[17]

3. Finally, this Court's decisions indicate that, where a covered jurisdiction fails to proffer an electoral plan that complies with the dictates of the Voting Rights Act, the district court may itself develop and implement an interim plan. See *Wise* v. *Lipscomb*, 437 U.S. 535, 542 (1978) ("Pending * * * submission and clearance, if a State's electoral processes are not to be completely frustrated, federal

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[16] In its December 20, 1994 order, the court observed that reinstatement of the 1968 judicial election system would require county officials to resolve problems concerning the size of the districts and the number of municipal judges. J.S. App. 15 n.3. The court did not examine, however, the possibility of adapting that plan to avoid those administrative problems.

[17] For example, district lines could be redrawn to address the problem that "several of the districts would be very small" (J.S. App. 15 n.3) under the 1968 electoral scheme.

courts will at times necessarily be drawn further into the reapportionment process and required to devise and implement their own plans."); see also *Berry* v. *Doles*, 438 U.S. 190, 193 (1978); *Edge* v. *Sumter*, 775 F.2d 1509, 1513 (11th Cir. 1985) (per curiam). In such circumstances, the district court should exercise its discretion to "adopt a remedy that * * * implements the mandate of [Section] 5 in the most equitable and practicable manner and with the least offense to its provisions." *Clark* v. *Roemer*, 500 U.S. at 660; see also *NAACP* v. *Hampton*, 470 U.S. at 183. "[T]he court should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases." *McDaniel* v. *Sanchez*, 452 U.S. at 149 (quoting S. Rep. No. 295, 94th Cong., 1st Sess. 18-19 (1975)).

Accordingly, even if the district court correctly concluded that the traditional Section 5 remedies were foreclosed by the circumstances of this case,[18] its obligation was to develop—independently, or in coordination with the parties—an interim plan that comported both with Section 5's anti-retrogression principle, see *City of Lockhart* v. *United States*, 460 U.S. 125, 134 (1983), *Beer* v. *United States*, 425 U.S. 130, 140 (1976), and with the teachings of *Miller* v. *Johnson*, *supra*.[19]

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[18] See, *e.g.*, J.S. App. 2 ("The court finds this case to be one with no easy solution.").

[19] The State suggests (Mot. to Dis. 17, 18) that the district court was precluded from enjoining elections under the unprecleared electoral system because the County had been found to have violated the "procedural," rather than "substantive," provisions of Section 5. That suggestion contradicts this Court's holding that an order enjoining implementation of unprecleared changes is required so long as there exists the "possibility" of discrimination. *NAACP* v. *Hampton*, 470 U.S. at 181.

The parties proffered ten proposed electoral plans, some of which may have met these requirements. See J.S. App. 104-107 (Stipulations of Plaintiffs and Monterey County for Hearing to Show Cause). The district court rejected those plans solely because they would have violated one or more state constitutional provisions. As the district court earlier acknowledged (J.S. App. 16-17), however, state laws cannot be permitted to bar implementation of an effective remedy for a federal Voting Rights Act violation. *Katzenbach* v. *Morgan*, 384 U.S. 641, 646-647 (1966); accord *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964).[20] "[F]ederal courts are often * * * faced with hard remedial problems in minimizing friction between their remedies and legitimate state policies." *Connor* v. *Finch*, 431 U.S. 407, 414 (1977) (quoting *Taylor* v. *McKeithen*, 407 U.S. 191, 194 (1982)); see also *id.* at 414-416 ("Mississippi's historic policy against fragmenting counties is insufficient to overcome the strong preference for single-member districting" to remedy a violation of the Voting Rights Act).[21]

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[20] As discussed above, moreover, the district court found that the State's asserted interests in coextensive jurisdictional and electoral municipal court districts, and in undivided city districts, are not absolute prescriptions, and that the State itself has observed them inconsistently. See note 12, *supra*.

[21] The State relies on this Court's decision in *Houston Lawyer's Ass'n* v. *Attorney General of Texas*, 501 U.S. 419 (1991). That case did not hold that federal courts lack the authority to order a remedy that overrides an inconsistent state electoral policy, when necessary to redress an established violation of federal law. Rather, it held that a legitimate,

CONCLUSION

The November 1, 1995, order of the three-judge court should be reversed, and the case remanded with instructions to enjoin enforcement of the consolidation ordinances until such time as they receive administrative or judicial preclearance.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

ALAN JENKINS
Assistant to the Solicitor General

STEVEN H. ROSENBAUM
EILEEN PENNER
Attorneys

MAY 1996

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uniform state electoral policy may be considered as one of a totality of factors in determining whether a violation of Section 2 of the Voting Rights Act has occurred, and is relevant to the question of an appropriate remedy. *Ibid.*